UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, Plaintiff, vs. ENRON CORP., et al., Defendants.	§	Consolidated Lead No. H-01-3624
AMERICAN NATIONAL INSURANCE COMPANY, et al., Plaintiffs, vs. J.P. MORGAN CHASE & COMPANY, Defendant.	§	Civil Action No. G-02-0299

DEFENDANT J.P. MORGAN CHASE & CO.'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT AND BRIEF IN SUPPORT AND REQUEST FOR ORAL HEARING

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Defendant J.P. Morgan Chase & Co. ("JPMorgan Chase" or "Defendant") respectfully moves to dismiss the First Amended Complaint ("Amended Complaint" or "Am. Compl.") of Plaintiffs American National Insurance Company, *et al.* ("Plaintiffs"), pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, and submits the following reasons in support.

PRELIMINARY STATEMENT

Plaintiffs have failed to cure the fatal deficiencies of their Original Petition. The Amended Complaint, like its predecessor, is a pleading of mere slur and innuendo, based on wholly conclusory allegations. Plaintiffs allege that they "purchased common stock, bonds, preferred stock, and commercial paper and other securities" of Enron Corporation and/or its affiliates ("Enron"), but they do not say with any precision what they purportedly purchased or from whom, nor do they allege with the requisite particularly what representations they purportedly relied on in making such purchases. Thus, Plaintiffs do not allege that JPMorgan Chase sold any Enron securities to Plaintiffs; Plaintiffs do not allege any misrepresentation by JPMorgan Chase to them in connection with their alleged purchases of Enron Securities; and Plaintiffs do not allege any relationship or dealings with JPMorgan Chase that might be said to impose a duty by JPMorgan Chase to disclose information to Plaintiffs in connection with the purchases they allegedly made. Plaintiffs likewise do not allege what Enron financial statements they supposedly relied on in connection with their alleged purchases of Enron securities, and in any event Plaintiffs do not allege that JPMorgan Chase had any involvement in the preparation or certification of any such financial statements. To the contrary, Plaintiffs have filed a separate lawsuit against those who Plaintiffs say participated in the issuance of false and misleading financial statements on which Plaintiffs purportedly relied. *See American National Insurance Co., et al. v. Arthur Andersen, L.L.P., et al.*, Cause No. 01CV1218 (severed from *Newby, et al. v.*

Enron Corp., et al., Civil Action No. H-01-3624 ("Newby"), and remanded to the 56th Judicial District of Galveston County, Texas by Order of July 19, 2002; again removed by Notice of Removal by co-defendant Rebecca Mark-Jusbasche on August 19, 2002).

Plaintiffs have added new, but wholly conclusory allegations that Plaintiffs purchased Enron securities in reliance on "'buy' recommendations and other positive statements made by Morgan" concerning Enron. The new allegations only underscore the insufficiency of Plaintiffs' claims against JPMorgan Chase, as even now, after being ordered to file an amended complaint, Plaintiffs fail to allege a single instance in which any of them purportedly received and relied on a recommendation by JPMorgan Chase in connection with the purchase of any Enron security. Moreover, analysts' statements made by JPMorgan Chase's securities affiliates[1] were nothing more than the repetition of publicly available information about Enron and the analysts' personal opinions. They are no basis for Plaintiffs' state law fraud claims under the Texas Securities Act,[2] Texas statutory fraud in a stock transaction,[3] and for common law fraud against JPMorgan Chase. Plaintiffs' effort to make J.P.Morgan Chase a deep-pocketed scapegoat for their losses is without merit.

As set forth below, the Amended Complaint should be dismissed for the following reasons: (1) Plaintiffs fail to state a claim against JPMorgan Chase with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure; (2) Plaintiffs' claims

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1 The Amended Complaint refers to a single defendant "Morgan" without differentiating between the activities of JPMorgan Chase and its subsidiaries and affiliates. These corporations are separate entities and, indeed, prior to January 1, 2001, were parts of the completely unrelated "J.P. Morgan" and "Chase" corporate families. Thus, for example, nearly all of the analyst statements referred to in the Amended Complaint were issued by J.P. Morgan Securities Inc. when it was unrelated to The Chase Manhattan Bank, the entity that engaged in prepaid forward transactions with Mahonia.

2 TEX. REV. CIV. STAT. ANN. Art. 581-10 *et seq.*

3 TEX. BUS. & COMM. CODE § 27.01.

under the Texas Securities Act have not been sufficiently pled and fail as a matter of law; (3) Plaintiffs' claims under Texas statutory and common law of fraud have not been sufficiently pled and fail as a matter of law; and (4) Plaintiffs have failed to allege any facts to support their claims that JPMorgan Chase has conspired with Enron, and is liable as a control person and/or aider and abettor of violations of Texas law.

ALLEGATIONS OF THE AMENDED COMPLAINT

PLAINTIFFS' INVESTMENTS IN ENRON

Although it is at the heart of their claims, Plaintiffs aver in only the most conclusory terms that they "purchased Enron stock, bonds, preferred stock, commercial paper and other securities" in reliance upon Enron's "misleading statements". Am. Compl. ¶ 14. Plaintiffs further claim—again only in wholly conclusory terms—that they also purchased those Enron securities in reliance on "'buy' recommendations and other positive statements made by" JPMorgan Chase "with full knowledge that the representations were untrue". Am. Compl. ¶¶ 47, 51. Plaintiffs have failed to allege (1) what Enron securities each of the eight Plaintiff insurance companies purchased, (2) when they purchased the Enron securities, (3) from whom they purchased these securities, and (4) whether, how, and on what terms the securities were disposed of. Plaintiffs do not allege that they purchased these securities from JPMorgan Chase.

ALLEGATIONS AGAINST JPMORGAN CHASE

Plaintiffs seek to pin their alleged losses from their unspecified Enron investments on JPMorgan Chase through two basic allegations. First, Plaintiffs spend several paragraphs characterizing JPMorgan Chase's relationship with Mahonia Limited, to support their claim that JPMorgan Chase failed "to disclose materials facts regarding its relationship with Mahonia which had the effect of misstating Enron's financial position." *See* Am. Compl. ¶ 27. The Amended Complaint further alleges that at the same time, JPMorgan Chase was "recommending

to Plaintiffs and other investors to buy Enron securities and portraying Enron was [sic] a well-managed, financially solid company." *See id.* at ¶ 27. These allegations clearly call for Plaintiffs to identify the essential factual bases thereof, including, among others, the specific statements that purportedly recommended or portrayed Enron in a particular way, and the nature of JPMorgan Chase's alleged duty to disclose its relationship with business counterparts like Mahonia. Plaintiffs have failed to allege any of these facts.

THE AMENDED COMPLAINT DOES NOT ALLEGE ANY STATEMENTS BY JPMORGAN CHASE

The Amended Complaint does not indicate what specific recommendations or portrayals of Enron that Plaintiffs allegedly received or relied upon in their purchase of Enron securities. Plaintiffs do not allege that JPMorgan Chase made any misrepresentations to Plaintiffs in connection with their alleged purchases of Enron securities. In fact, Plaintiffs do not allege JPMorgan Chase ever made any statement to them in connection with any of their Enron securities purchases. No communications are alleged to have ever taken place with JPMorgan Chase.

Plaintiffs have added allegations in their Amended Complaint concerning analyst reports supposedly "issued" by JPMorgan Chase, allegations that were apparently inspired by other pleadings before this Court and elsewhere. In particular, Plaintiffs identify 24 one- or two-page "'buy' ratings" that were allegedly "issued" between June 1999 and November 2001.[4] Although Plaintiffs refer to some of these ratings as having come from "Morgan", these "Morning Meeting Research Notes" were all in fact distributed by J.P. Morgan Securities Inc. ("JPMSI"). JPMSI is not named as a defendant in this action. The Complaint further fails to

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[4] The Amended Complaint refers to "'buy' ratings" on March 23, June 15, July 10, July 12, and October 20, 2001 that do not exist. *See* Am. Compl. ¶ 47. Notably, some of these mistakes are the same as errors found in plaintiffs' complaint in *Newby v. Enron Corp.* —the principal Enron shareholder class action lawsuit pending in the Southern District of Texas from which Plaintiffs have apparently copied their allegation.

allege that these reports contain anything more than the repetition of publicly available information about Enron and the analysts' personal opinions.

THE AMENDED COMPLAINT DOES NOT SPECIFY THAT JPMORGAN CHASE HAD ANY DUTY TO DISCLOSE

Despite allegations that JPMorgan Chase omitted to state material facts concerning Enron and/or Mahonia, Plaintiffs also do not allege that JPMorgan Chase had any duty to disclose any aspect of its relationship with those entities. Plaintiffs allege no facts from which such a duty could have arisen. In fact, the Amended Complaint does not indicate that Plaintiffs had any relationship whatsoever with JPMorgan Chase.

THE AMENDED COMPLAINT FAILS TO ALLEGE ANY LINK BETWEEN THE ALLEGED FRAUD AND JPMORGAN CHASE

Finally, Plaintiffs resort to entirely generic allegations of secondary liability. The Amended Complaint, however, pleads no facts in support of its accusations that JPMorgan Chase conspired with, controlled, or aided and abetted Enron in allegedly defrauding Plaintiffs. To be sure, Plaintiffs allege repeatedly in wholly conclusory fashion that JPMorgan Chase is vicariously liable for Enron's conduct. *See, e.g.,* Am. Compl. ¶ 53 ("Defendant Morgan . . . pursued a conspiracy and common course of conduct with Enron and aided and abetted . . . ."). But there are no facts alleged that, if proven, support such accusations against JPMorgan Chase.

ARGUMENT

POINT I

THE AMENDED COMPLAINT FAILS TO PLEAD PLAINTIFFS' CLAIMS AGAINST JPMORGAN CHASE WITH THE PARTICULARITY REQUIRED BY FEDERAL RULE OF CIVIL PROCEDURE 9(B)

The Amended Complaint lodges three causes of action against JPMorgan Chase. As is clear from the elements of these causes of action, each sounds in fraud:

(1) *Common Law Fraud.* As this Court has explained, "[t]o prevail on a common law fraud cause of action, a plaintiff must prove that the defendant made: (1) a misstatement or omission (2) of a material fact (3) with the intent to defraud (4) on which the Plaintiffs relied, and (5) which proximately caused him or her injury." *Hernandez v. Ciba-Geigy Corp. USA*, 200 F.R.D. 285, 291 (S.D. Tex. 2001), *citing Williams v. WMX Technologies, Inc.*, 11 F.3d 175, 177 (5th Cir. 1997). *See also Oppenheimer v. Prudential Sec. Inc.*, 94 F.3d 189, 194 (5th Cir. 1996) ("The elements that are necessary to state a claim of common law fraud are basically identical [to those to state a claim of statutory fraud]. 'The elements of a fraud are a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of its truth, which was intended to be acted upon, which was relied upon, and which caused injury.'" (internal citations omitted)).

(2) *Statutory Fraud.* Texas Business and Commerce Code § 27.01 prohibits fraud in transactions involving "stock in a corporation" where the Defendant makes a:

> (1) false representation of a past or existing material fact . . .
>
> > (A) made to a person for the purpose of inducing that person to enter into a contract; and
> >
> > (B) relied on by that person in entering into that contract.

TEX. BUS. & COM. CODE ANN. §27.01(a)(1)(2002).[5] Plaintiffs must allege specific false representations in order to state a claim thereunder. A claim of statutory fraud requires proof of "an affirmative misrepresentation of fact, concealment of a material fact, a false promise, or an omission in the case of a fiduciary relationship." *James v. Nico Energy Corp.*, 838 F.2d 1365, 1371 (5th Cir. 1988) (emphasis added) (affirming district court's summary judgment against plaintiff's statutory fraud claim because plaintiff failed to demonstrate an affirmative misrepresentation of fact).

(3) *Securities Fraud Under The Texas Securities Act.* Section 581-33 (A)-(C) impose securities fraud liability on "sellers", "buyers," or "non-registering issuers" who offer[] or sell[] a security . . . by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, [are] liable to the person buying the security from him." TEX. REV. CIV. STAT. ANN. ART. 581-33(A)-(C)(2002). Liability for aiding and abetting a violation of the statute lies against any person who "directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security." TEX. REV. CIV. STAT. ANN. ART. 581-33(F)(2)(2002). To establish liability under this standard, a plaintiff must demonstrate:

1) that a primary violation of the securities laws occurred;

2) that the alleged aider had 'general awareness' of its role in this violation;

3) that the actor rendered 'substantial assistance' in this violation; and

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[5] Section (a)(2) also provides for liability for "false promises to do an act," which Plaintiffs do not allege and does not apply here. TEX. BUS. & COM. CODE ANN. §27.01(a)(2) (2002).

4) that the alleged aider either a) intended to deceive plaintiff or b) acted with reckless disregard for the truth of the representations made by the primary violator.

Frank v. Bear, Stearns & Co., 11 S.W.3d 380, 384 (Tex. App. 2000) (citations omitted). The plaintiff must thus show "conscious intent, unless there is some special duty of disclosure, or evidence that the assistance to the violator was unusual in character and degree," in which case a recklessness standard would apply. *Abbott v. Equity Group Inc.*, 2 F.3d 613, 621 (5th Cir. 1993) (refusing to imply a duty to disclose by underwriters to communicate riskiness of investment to investors and holding that plaintiffs failed to meet the scienter requirement).

A. Plaintiffs' Allegations Sound In Fraud And Must Be Plead With Particularity Under Rule 9(b)

As demonstrated above, each of the Plaintiffs' claims sounds in fraud. Indeed, Plaintiffs summarize their own allegations as such: "Defendant Morgan's committed engaged [sic] in a course of conduct constituting fraud . . . ." *See* Am. Compl. ¶ 27; *see also id.* ¶¶ 13, 14, 17, 19, 29, 31, 41. The common law and statutory claims are clearly labeled as fraud claims by the Amended Complaint. *See* Am. Complaint § V ("STATUTORY FRAUD IN STOCK TRANSACTIONS", "COMMON LAW FRAUD"). Plaintiffs' allegations pursuant to the Texas Securities Act are also plainly securities fraud allegations based on charges of "misleading" and "materially misrepresent[ing]" facts concerning its business with Enron and the intentional aiding and abetting of violations. *See Id.* ¶ 56.

Because Plaintiffs' claims "sound in fraud," the heightened pleading requirements of Federal Rule of Civil Procedure Rule 9(b) apply. *See In re Azurix Corp. Sec. Litig.*, No. H-00-4034, 2002 WL 562819, at *11 (S.D. Tex. Mar. 21, 2002); Fed. R. Civ. P. 9(B) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated

with particularity.").[6] *See also Hernandez,* 200 F.R.D. at 291 ("Rule 9(b) applies to all allegations that sound in fraud. In other words, Rule 9(b) looks beyond how the plaintiff phrases his or her complaint, and applies 'to all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud.'" (internal citations omitted)). Rule 9(b) clearly governs Plaintiffs' allegations here. *See Williams v. WMX Techs., Inc.,* 112 F. 3d 175, 177 (5th Cir. 1997) (applying Rule 9(b) to state law claims of common law fraud); *In re Compaq. Sec. Litig.*, 848 F. Supp. 1307, 1312 (S.D. Tex. 1992) (subjecting Plaintiffs' allegations under § 27.01 of the Texas Business and Commerce Code and the Texas Securities Act to scrutiny under 9(b)).

B. Rule 9(b) Requires That "Averments Of Fraud" Be Pled With Particularity

Because Rule 9(b) applies to the Amended Complaint, Plaintiffs' claims against JPMorgan Chase cannot be sustained on the basis of generalized or conclusory allegations. The real work of Rule 9(b) is done in cases like this, where Plaintiffs' fraud charges against JPMorgan Chase are nothing more than a cynical attempt to free ride on the accusations of Enron's misconduct.

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[6] The particularity requirement serves four principal functions: (i) to ensure defendants have sufficient information to formulate a defense; (ii) to protect defendants against frivolous suits; (iii) to eliminate fraud actions in which the facts are sought to be learned after discovery; and (iv) to protect defendants from underserved harm to their goodwill and reputation. *Wilkins v. N. Am. Constr. Corp.,* 173 F. Supp. 2d 601, 614 (S.D. Tex 2001) (citing *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783 (4th Cir. 1999)); *see also In re Azurix,* 2002 WL 562819, at *11 (S.D. Tex. March 21, 2002) ("Particularity is required so that the complaint provides defendants with fair notice of the plaintiffs' claims, protects defendants from harm to their reputation and goodwill, reduces the number of strike suits, and prevents plaintiffs from filing baseless claims and then attempting to discover unknown wrongs." (citation omitted)). "The particularity rule serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (internal quotations and citations omitted).

To satisfy the heightened pleading standard of Rule 9(b), a plaintiff must specify the "time, place and the contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby." *Williams,* 112 F.3d at 177; *Melder v. Morris*, 27 F.3d 1097, 1100 (5th Cir. 1994). *See also Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (finding that Rule 9(b) requires a "precise" showing of (1) the alleged statements or omissions, (2) the time and place of, as well as person responsible for, the statements or omissions, (3) the contents of the statements and the manner in which they misled the plaintiff, and (4) what defendants obtained as a result of the fraud) (internal citations omitted). In other words, "a plaintiff's pleading fraud must set forth the 'who, what, when, and where . . . before access to the discovery process is granted.' Anything less fails to provide defendants with adequate notice of the nature and grounds of the claims." *Hart v. Bayer Corp.,* 199 F.3d 239, 248 n.6 (5th Cir. 2000) (quoting *Williams*, 122 F.3d at 178).

C. Plaintiffs Must Plead Facts Supportive of An Inference Of Scienter

Furthermore, Plaintiffs must allege that JPMorgan Chase had the requisite intent to defraud them.[7] Though Rule 9(b) permits intent to be alleged generally, it is clear that "there must be a factual basis to support the allegations of intent." *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996) ("In order to adequately plead scienter, a plaintiff must set

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[7] Scienter is required to be alleged to sustain each of Plaintiffs' fraud claims:

> Texas Securities Act, Section 581-33:
> "A person who directly or indirectly *with intent to deceive or defraud or with reckless disregard for the truth* or the law materially aids a seller, buyer, or issuer or a security is liable...." TEX. REV. CIV. STAT. ANN. ART. 581-33(F)(2)(2002) (emphasis added).
>
> Texas Business and Commerce Code, Section 27.01 and common law fraud:
> The false misrepresentation must be made "*for the purpose* of inducing [the defrauded person] to enter into a contract." TEX. BUS. & COM. CODE ANN. §27.01(a)(1)(A) (2002).

forth specific facts to support an inference of fraud"), citing *Tuchman v. DSC Comms. Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994). *See also Stevelman v. Alias Research Inc.*, 174 F.3d 79, 84 (2d Cir. 1999) ("it is well established that a plaintiff must still allege facts that give rise to a strong inference of fraudulent intent") (internal quotations omitted). The Fifth Circuit has further explained, "Although Rule 9(b) expressly allows scienter to be 'averred generally', simple allegations that defendants possess fraudulent intent will not satisfy Rule 9(b). The plaintiffs must set for *specific facts* supporting an inference of fraud." *Melder, 27* F.3d at 1102 (internal citation omitted)(emphasis original). *See also Norman v. Apache Corp.*, 19 F.3d 1017, 1022 (5th Cir. 1994) (internal citation omitted) ("[a]lthough the defendant's state of mind may be averred generally, Rule 9(b) requires the plaintiff to allege 'the existence of facts and circumstances sufficient to warrant the pleaded conclusion that fraud ha[s] occurred' or face dismissal of his claim.")[8]

D. Plaintiffs Have Failed To Plead Any Statements or Misrepresentations Sufficient To Sustain Their Fraud Claims Under Rule 9(b)

Plaintiffs have failed to meet the pleading requirements of Rule 9(b). Without pleading the alleged fraud with particularity as required by Rule 9(b), JPMorgan Chase does not have sufficient notice of the claims against it, cannot understand the factual basis of Plaintiffs' conclusory claims, and cannot answer the charges of the Amended Complaint. Without these

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[8] The Private Securities Litigation Reform Act, passed in 1995, sets forth the particularity requirement with regard to pleading scienter in the federal securities fraud context. *See* 15 U.S.C. § 78u-4(b)(2) ("the complaint shall, with respect to each act or omission alleged to violate this chapter, state *with particularity* facts giving rise to a *strong* inference that the defendant acted with the required state of mind." (emphasis added)). This "heightened" pleading standard in essence codified this Circuit's existing understanding of Rule 9(b) with regard to fraud claims generally. All of the cases cited above, requiring the allegation of specific facts as to scienter, all pre-date the PSLRA and continue to stand as the prevailing authority.

facts, Plaintiffs flout the basic purposes of Rule 9(b). Nowhere in their complaint do plaintiffs allege any facts about:

- their alleged purchase of Enron securities; only Plaintiffs' know when, where, from whom, and at what price they purchased unspecified Enron securities, and yet they decline to share these basic facts;
- alleged misstatements or misrepresentations made by JPMorgan Chase to each of the Plaintiffs, that they supposedly relied upon in the purchase of those securities;
- JPMorgan Chase's alleged knowledge of or intent to commit a fraud upon Plaintiffs.

The Amended Complaint generally and vaguely references recommendations and portrayals that Plaintiffs purportedly relied upon without a identifying a single specific instance of (a) a misrepresentation by JPMorgan Chase (b) to one of the Plaintiffs (c) on which that Plaintiff relied in purchasing an Enron security. Plaintiffs do make passing mention of so-called "'buy' ratings" and "recommendations" allegedly "issued" by JPMorgan Chase to pretend compliance with Rule 9(b), s*ee* Am. Compl. ¶ 47, 51, but no effort is made to identify a single specific misstatement therein. *See Hernandez*, 200 F.R.D. at 291 (dismissing claims where plaintiffs cited to promotional literature without citing "one statement that was made in any of the literature"); *see also Williams,* 112 F.3d 179 (in dismissing per Rule 9(b), citing plaintiffs' failure to "attempt to parse out [allegedly fraudulent newspaper articles] to demonstrate which statements were fraudulent and attributable to [defendants]."). Similarly, there are simply no allegations about why any of the purported statements were fraudulent. *See id.* ("plaintiffs must also set forth an explanation as to why the statement or omission complained of was false or misleading."). Such a lack of particularity is what Rule 9(b) was enacted to avoid.

At any rate, these reports (a) were made by JPMSI, not JPMorgan Chase and (b) are completely innocuous.[9] The JPMSI research notes simply repeated public information concerning Enron and offered the analysts' opinions about the company. Moreover, these notes were not in fact "issued" to the public at all, despite Plaintiffs' claims to the contrary, but were distributed to select institutional clients of JPMSI; Plaintiffs do not allege that they were JPMSI clients and/or that such reports were distributed to them. Plaintiffs attempt to breathe life into these non-actionable statements by alleging — in wholly conclusory fashion — that JPMorgan Chase knew that these "representations" were false, without any allegations that specific reports were in fact false at the time they were made.

If they have a claim, Plaintiffs should be able to allege facts as required by 9(b). Discovery will not help Plaintiffs identify the very statements that they allegedly received, and that they allegedly relied upon, in allegedly buying Enron securities. Plaintiffs' failure to allege the facts supposedly constituting fraud mandates dismissal.

E. Plaintiffs Plead No Facts To Establish Scienter

Plaintiffs fare no better in alleging knowledge or intent. Plaintiffs chant "knew or should have known" as if such phrases had talismanic power to channel scienter out of thin air. Plaintiffs claim that the JPMSI analysts that distributed Research Notes concerning Enron from 1999-2001 did so with "full knowledge" that their reports were untrue at the time. *See* Am. Compl. ¶ 51. Plaintiffs offer no factual allegations to support this claim. There is no allegation

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[9] On a Motion to Dismiss, a court may also consider documents integral to and explicitly relied on in the complaint. *See In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 881-82 (S.D. Tex. 2001)("The Court may . . . consider documents 'integral to and explicitly relied on in the complaint,' that the defendant appends to his motion to dismiss, as well as the full text of documents that are partially quoted or referred to in the complaint.") Accordingly, this Court may properly consider the analysts' reports referred to in the Plaintiffs' Amended Complaint, *see* Am. Compl. ¶¶ 47, 51, all of which were distributed by JPMSI and did not contain any misrepresentations. *See e.g.*, "Morning Meeting Research Notes" dated June 9, 1999 and July 19, 2000, attached hereto as Appendices to this Motion.

that the analysts did not genuinely hold the opinions reflected in the Research Notes, nor is there any allegation that the Research Notes did not accurately reflect the available information about Enron.[10] Conclusory allegations such as this, that a defendant knew its statements were false, are precisely the kind of allegations that do not satisfy Rule 9(b)'s pleading requirements. *See Ziemba*, 256 F.3d at 1210 (plaintiffs do not satisfy Rule 9(b) when they "have not alleged any facts suggesting actual awareness" of another's fraud).

The Amended Complaint is not saved by its reference to JPMorgan Chase's alleged transactions with Mahonia Limited, an independent corporation, or by the assertion that JPMorgan Chase allegedly exercised effective control over Mahonia. *See* Am. Compl. ¶ 14, 17, 19-46. Even if all of Plaintiffs' alleged facts were true, that JPMorgan Chase did business with Enron, either directly or through Mahonia, does not at all lead to the conclusion that it was somehow privy to inside information about Enron's alleged fraud. Such conclusory assertions, based on tenuous and unsubstantiated leaps in logic, are not sufficient to plead JPMorgan Chase's intent.

Finally, Plaintiffs assert that JPMorgan Chase committed the alleged fraud with the motive to earn "tens of millions of dollars in underwriting and consulting fees" and profit from "billions of dollars of loans to Enron". Am. Compl. ¶18. Plaintiffs further claim that JPMorgan Chase acted to "creat[e] a market for Enron stock," Am. Compl. ¶¶23, 47, and to earn "fees" from and facilitate "investing" in "LJM2", an alleged Enron-related partnership, Am. Compl. ¶49. Such "motives" do not suffice as specific particularized facts of intent. *See* Melder,

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[10] As noted above, Plaintiffs also ignore that JPMSI, which issued the Research Notes, was, until December 31, 2000, part of J.P. Morgan & Co. Incorporated. Accordingly, it was a separate institution from The Chase Manhattan Bank, the entity that engaged in the prepaid forward transactions with Mahonia. Surely, there can be no claim that any knowledge possessed by Chase personnel can be imputed to the JPMSI analysts when they issued Research Notes prior to the J.P. Morgan/Chase merger.

27 F.3d at 1102 ("This lone allegation of motive [does not] set out facts sufficient to allow for a proper inference of scienter. Accepting the Plaintiffs allegation of motive . . . would effectively eliminate the state of mind requirement . . . . The district court aptly dubbed this allegation "a nihilistic approach to Rule 9(b) jurisprudence." (internal citations omitted)); *see also Mortensen v. Americredit Corp., et al.*, 123 F.Supp.2d 1018, 1023 (N.D. Tex. 2000) ("A generalized motive 'which could be imputed to any publicly-owned, for-profit endeavor, is not sufficiently concrete for purposes of inferring scienter" (internal citation omitted)); *Coates v. Heartland Wireless Comms., Inc.*, 55 F.Supp. 628, 643 (N.D. Tex. 1999)("[A]ssertions that would almost universally be true, such as the desire to raise capital, or successfully to bring a public offering to fruition, economic self-interest . . . . are inadequate of themselves to plead motive . . . . [and] are therefore alone insufficient to plead a strong inference of fraud." (internal citations omitted)).

POINT II

PLAINTIFFS FAIL TO ALLEGE SUBSTANTIVE ELEMENTS OF THEIR CLAIMS

Plaintiffs also fail to allege key substantive elements of each of their claims based on the Texas Securities Act and statutory and common law fraud.

A. JPMorgan Chase Cannot Be A Primary Violator Of The Texas Securities Act As A Matter Of Law

Article 581-33 of the Texas Securities Act provides for primary liability of only three categories of defendants:

- "A. Liability of Sellers. . . . a person who offers or sells a security . . . by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, is liable to the person buying the security from him."[11]

[11] This section "is a privity provision, allowing a buyer to recover from his offeror or seller . . . some nonprivity defendants may be reached under other sections of the Act." *Frank v. Bear, Stearns & Co.*, 11 S.W.3d 380, 383 (Tex. App. 2000) (internal quotations and citations omitted) (holding that underwriters did not violate Texas Securities Act). Therefore, unless the defendant actually sells the security to the buyer, there can be no

- "B. Liability of Buyers. A person who offers to buy or buys a security. . . ."
- "C. Liability of Nonselling Issuers Which Register."

TEX. REV. CIV. STAT. ANN. ART. 581-33(A)-(C)(2002).

Plaintiffs do not allege that JPMorgan Chase is the seller, buyer or issuer of any Enron security purchased by any of the Plaintiffs. Thus, Plaintiffs' claim against JPMorgan Chase for primary violations of the Texas Securities Act fail as a matter of law.

B. Plaintiffs Fail To Allege "Control Person" Liability

Late in the Amended Complaint, while summarizing its causes of action, Plaintiff first raises its conclusory claim that JPMorgan Chase is somehow liable as a "control person". *See* Am. Compl. ¶57.

The Texas Securities Act creates liability for a person who "directly or indirectly controls a seller, buyer, or issuer of a security [who] is liable under Section 33A, 33B, or 33C." TEX. REV. CIV. STAT. ANN. ART. 581-33(F)(1) (2002). To state a claim of "control person" liability under the Texas Securities Act, Plaintiffs must satisfy a two-prong test: "that the defendant exercised control over the operations of the corporation in general, and that the defendant had the power to control the specific transaction or activity upon which the primary violation is predicated." *Frank*, 11 S.W.3d at 384 (citing *Abbott,* 2 F.3d at 620).

The threshold question as to this allegation is, of course, what seller, buyer or issuer is JPMorgan Chase alleged to have controlled? Plaintiffs fail to plead any facts concerning such control. Plaintiffs allege that JPMorgan Chase allegedly controlled Mahonia, an

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liability under this provision of the Act. *See also Millcreek Assocs. v. Bear, Stearns & Co.*, 205 F. Supp. 2d 664 (W.D.Tex. 2002) (dismissing plaintiff's state securities claim because section 581-33(A)(2) requires privity between buyer and seller and defendants did not offer to sell nor did they sell any security to plaintiffs).

entity that entered into transactions with Enron. *See* Am. Compl. ¶¶ 29-30. However, Plaintiffs do not allege that Mahonia falls under any one of the three categories of persons potentially liable under the statute: seller, buyer or issuer.

Presumably, Enron was the issuer of the Enron securities allegedly purchased by Plaintiffs. However, Plaintiffs have wholly failed to allege any facts that would establish that JPMorgan Chase controlled either Enron's general operations or any of Enron's specific transactions involving the Plaintiffs. Therefore, Plaintiffs have failed to allege that JPMorgan Chase controlled any alleged violator of the Texas Securities Act or statutory or common law of fraud.

C. Plaintiffs Have Failed To Allege Conspiracy And Concerted Action

Although Plaintiffs baldly assert that JPMorgan Chase conspired and participated in a common scheme with Enron, it has not pled any of the elements required to show the existence of a conspiracy. Am. Compl. ¶¶19, 44, 50, 53, 54, 60, and 65. "To prove a cause of action for civil conspiracy under Texas law, a plaintiff must establish the following elements: '(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, No. 01-11026, 2002 WL 1733229 (5th Cir. August 12, 2002). Furthermore, "Fifth Circuit precedent holds that a civil conspiracy to commit a tort that sounds in fraud must be pleaded with particularity." *Ashlar Fin. Serv. Corp. v. Sterling Fin. Co.*, No. CIV. A. 300CV2814-AH, 2002 WL 206439 (N.D.Tex. February 8, 2002)(internal citations omitted). *See also Griswold v. Alabama Dep't of Indus. Relations*, 903 F. Supp. 1492, 1500-01 (M.D. Ala. 1995) (courts require "a heightened pleading standard in conspiracy cases because a defendant must be informed of the nature of the conspiracy alleged.").

The Amended Complaint is devoid of any factual allegations that JPMorgan Chase and Enron had an agreement to accomplish an unlawful common plan to defraud the investing public generally and Plaintiffs specifically. Plaintiffs do not allege that representatives of Enron met with people from JPMorgan Chase, and they decided and understood that they would work together to commit the various frauds of which Enron has been accused. Plaintiffs have pled no "meeting of the minds" or anything of the sort.

D. Plaintiffs Fail To Establish Any Duty To Disclose

Plaintiffs also assert that JPMorgan Chase concealed or omitted to state facts concerning its alleged relationship and business with Mahonia, and its alleged knowledge of Enron's true financial condition. The Amended Complaint fails to acknowledge, however, that any purported concealment or omission is only actionable if JPMorgan Chase had a duty to disclose facts concerning Mahonia or Enron to Plaintiffs. "We begin with some basic principles . . . . A defendant's failure to disclose a material fact is fraudulent only if the defendant has a duty to disclose that fact." *Trustees of the Northwest Laundry & Dry Cleaners Health & Welfare Trust Fund v. Burzynski,* 27 F.3d 153, 157 (5th Cir. 1994). As the Fifth Circuit explained, a duty to speak arises by operation of law when (1) a confidential or fiduciary relationship exists between the parties; or (2) one party learns later that his previous affirmative statement to another party was false or misleading; or (3) one party knows that the other party is relying on a concealed fact, provided that the concealing party also knows that the relying party is ignorant of the concealed fact and does not have an equal opportunity to discover the truth; or (4) one party voluntarily discloses to the other party some but less than all material facts, so that he must disclose the whole truth lest his partial disclosure convey a false impression. *Union Pac. Res. Group, Inc. v. Rhone-Poulenc, Inc.*, 247 F.3d 574, 586 (5th Cir. 2001).

Plaintiffs do not allege any relationship with JPMorgan Chase, much less a special or fiduciary one. The Amended Complaint thus provides no basis for the assertion of any claim based on an alleged failure to disclose. Because Plaintiffs do not allege any dealings at all with JPMorgan Chase nor any communications therefrom, Plaintiffs' allegations lead to the unreasonable suggestion that because JPMorgan Chase did business with Enron, JPMorgan Chase can be held liable for failing to seek Plaintiffs out and provide them with complete and accurate disclosure as to a fraud it knew nothing about.

CONCLUSION

For the foregoing reasons, Defendant JPMorgan Chase respectfully requests that this Court dismiss Plaintiffs' First Amended Complaint with prejudice, and that it provide to JPMorgan Chase such other relief as it may deem just and proper. Pursuant to Local Rule 7.5, JPMorgan Chase requests oral argument of this motion.

Dated: Houston, Texas
September 9, 2002

Respectfully submitted,

MITHOFF & JACKS, L.L.P.

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint has been served upon all counsel by via electronic mail, upon the following by certified mail, this 9th day of September, 2002:

Andrew J. Mytelka
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RICHARD WARREN MITHOFF

The Exhibit(s) May

Be Viewed in the

Office of the Clerk